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Supreme Court, U.S.
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No. 96-2045

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID A. SOSNE, TRUSTEE,

Petitioner,

v.

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether claims for alleged violations of the automatic stay under 11 U.S.C. §362 may be used as a substitute for the statutory method of avoiding pre-petition assignments and the recovery of the proceeds under 11 U.S.C. §§547, 548 and 550?

2. Whether 11 U.S.C. §362 automatically bars a party from collecting property to satisfy a pre-petition judgment against the bankruptcy debtor, when neither the bankruptcy estate nor the debtor has an interest in that property?

STATEMENT PURSUANT TO RULE 29.6

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On or before June 26, 1997, David A. Sosne, bankruptcy trustee, filed his petition for a writ of certiorari with this Court, Case No. 96-2045.

Respondents did not file a brief in opposition.

However, respondents, as petitioners, filed a separate petition for a writ of certiorari from the same Eighth Circuit decision on June 27, 1997, Case No. 97-7.

David Sosne filed a brief in opposition to respondents' petition, but filed it in Case No. 96-2045 instead of Case No. 97-7. Respondents assume the clerk renumbered it and filed it in Case No. 97-7 instead of Case No. 96-2045.

On August 28, 1997, respondents were advised by the clerk that they were requested to file a brief in opposition to the petition of David Sosne in Case No. 96-2045.

It is respondents' position that the Court should grant certiorari in this case, but for the reason asserted by respondents, as petitioners, in Case No. 97-7, and not for the reasons asserted by David Sosne in Case No. 96-2045.

Reinert & Duree, P.C. are the attorneys for the other respondents, Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James C. Landes, who obtained a judgment for fraud against Just Brakes Corporate Systems, Inc. ("Just Brakes") in 1988. Just Brakes appealed that decision which was affirmed by the Missouri Court of Appeals.

On January 10, 1991, Just Brakes assigned all right, title and interest in its only asset, the trademark "Just Brakes" to F.G.R. Management, Inc.

Under Missouri law, which applies to determine the nature and extent of a debtor's interest in property, this pre-petition assignment is valid as to Just Brakes even if it is void as to its creditors. *Kahn v. Royal Banks of Missouri*, 790 S.W.2d 503, 506 [1,2] (Mo. App. 1990), *Loe v. Downing*, 325 S.W.2d 479, 482 [2] (Mo. 1959). State law controls this issue. *In Re: N.S. Garrott & Sons*, 772 F.2d 462, 467 [7,8]

(8th Cir. 1985). Just Brakes will never be restored to an ownership interest in the trademark no matter how fraudulent the assignment.

Respondents filed several ancillary lawsuits in St. Louis County, Missouri to facilitate execution of their judgment on the only asset of Just Brakes, its trademark, beginning in January, 1991.

After obtaining a court order compelling the sale of the trademark (which did not implicitly restore ownership of the trademark to Just Brakes, as asserted by petitioner), a sheriff's sale was scheduled for July 30, 1991.

Immediately before the sale, Just Brakes filed for Chapter 11 bankruptcy. The only significant claimed asset listed was the trademark which had already been assigned to F.G.R. Management, Inc. Almost all of the creditors listed were either the respondents or the owners of Just Brakes which had assisted it in committing the fraud resulting in respondents' judgment, or the attorneys or consultants representing Just Brakes in the fraud suit.

Respondents moved to dismiss the Chapter 11 case and the bankruptcy court granted the motion on September 24, 1991. App. 6. The Bankruptcy Court stated that the "claim for avoidance" of the pre-petition assignment of the trademark was an asset of the bankruptcy estate, while dismissing the Chapter 11 case. App. 6. Since the Chapter 11 bankruptcy case was dismissed, the respondents could not appeal that order, and had no need to. *In the Matter of Sims*, 994 F.2d 210, 214 [1,2] (5th Cir. 1993). As a result, that statement in the order of dismissal is not binding on the respondents under any principle of preclusion. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 [3] (2nd Cir. 1986).

The Court of St. Louis County then scheduled another sheriff's sale of the trademark for October 15, 1991. On that date, Just Brakes filed its second single asset bankruptcy, this time under Chapter 7, again listing an interest in the trademark as its, essentially, sole claimed asset. With few exceptions only the respondents and the parties that assisted Just Brakes in defrauding them or that represented or consulted with Just Brakes in the fraud suit were listed as creditors.

The Sheriff of St. Louis County (not the respondents as asserted by petitioner) proceeded with the sale of the trademark on October 15, 1991. App. 6. No one has challenged the propriety of proceeding with that foreclosure sale. App. 7, n. 1.

Respondents are accused of violating the automatic stay by applying for and obtaining a court order for the payout of the net proceeds of the sheriff's sale on October 24, 1991. App. 6, 7.

At that time the trustee had not filed any actions for avoidance of the pre-petition assignment of the trademark or for the recovery of the proceeds. Even the filing of such claims would not have vested any property rights in either the debtor or the trustee.

One year later the trustee filed an adversarial complaint for avoidance of the pre-petition assignment of the trademark and for, allegedly, violation of the automatic stay by requesting and obtaining the proceeds of the sheriff's sale. App. 7.

In 1993, the trustee dismissed his claims for avoidance and recovery under 11 U.S.C. §§547, 548 and 550, in order to avoid a jury trial at the District Court level, and, for

strategic purposes, limited his claim to alleged violations of the automatic stay. App. 7.

In this fashion the trustee attempted to substitute a claim for violation of the automatic stay, with respect to a claimed property interest in the trademark which had been assigned by the debtor more than nine months before the bankruptcy petition was filed, for claims for avoidance and recovery of the trademark or its proceeds under 11 U.S.C. §§547, 548 and 550.

The automatic stay bars actions against property of the debtor or the bankruptcy estate at the time the bankruptcy petition is filed. 11 U.S.C. §362.

Respondents respectfully submit that 11 U.S.C. §362(a)(6) must be read together with 11 U.S.C. §362(a)(2) which provides that the **enforcement** of a pre-petition judgment must be **against** the debtor or bankruptcy estate, not merely that the pre-petition judgment, which is being enforced, is against the debtor.

The trademark was not the property of the debtor at the time the bankruptcy petition was filed, since Just Brakes had assigned it to F.G.R. Management, Inc. more than nine months earlier.

The bankruptcy estate could acquire an interest in the trademark only through actions by the trustee for avoidance of the pre-petition assignment and recovery under 11 U.S.C. §§547, 548 and 550.

The Eighth Circuit held it was not necessary to determine whether a "claim for avoidance" of the pre-petition assignment of the trademark constituted property of either the debtor or the bankruptcy estate at the time Chapter 7 petition was filed. App. 9.

The statutes, 11 U.S.C. §§541(a)(1) & (3), 547, 548 and 550 and the cases, *In Re: Morning Treat Coffee Co., Inc.*, 77 B.R. 62, 65 [4] (M.D. La. 1987), *In Re: Springfield Furniture, Inc.*, 145 B.R. 520, 529 [6, 7] (E.D. Va. 1992), *In Re: Jameson's Foods, Inc.*, 35 B.R. 433 [1] (D.S.C. 1983) all hold that a claim for avoidance is not the property of the debtor at the time the bankruptcy petition is filed and does not become the property of the bankruptcy estate until the trustee successfully pursues a claim for avoidance under 11 U.S.C. §§547 or 548 and thereafter recovers the proceeds under 11 U.S.C. §550.

The automatic stay simply did not apply to property in which neither the debtor nor the bankruptcy estate had an interest.

Edwards v. Armstrong World Industries, Inc., 6 F.3d 312, 316, 317 [2-6] (5th Cir. 1993) held that the automatic stay did not bar the judgment creditors from collecting the proceeds of an appeal bond to satisfy a pre-petition judgment against the debtor, the Celotex Corporation, out of property in which the debtor no longer held an interest. That issue was not appealed further. However, if the automatic stay would have barred collection of a pre-petition judgment against the debtor, out of property in which neither the debtor nor the bankruptcy estate held an interest, the central issue in the same case on certiorari, *Celotex Corporation v. Bennie Edwards*, 514 U.S. 300, 131 L. Ed.2d 403, 115 S. Ct. 1493 (1995), would have been mooted. *Celotex* concerned the authority of the bankruptcy court to issue an injunction under 11 U.S.C. §105 under circumstances which are essentially identical to those presented here. If the automatic stay barred such post-petition efforts to collect a pre-petition judgment

against the debtor, out of property in which neither the debtor nor the bankruptcy estate held an interest, an injunction under 11 U.S.C. §105 would have been completely unnecessary. An 11 U.S.C. §105 injunction was neither requested nor issued in the case at bar.

The respondents submit that the automatic stay did not bar them from satisfying a pre-petition judgment against the debtor out of property in which neither the debtor nor the bankruptcy estate held an interest. There was no violation of the automatic stay.

REASONS FOR DENYING THE PETITION

I. The Eighth Circuit's decision requiring the trustee to prove claims for avoidance of a pre-petition assignment and recovery before permitting the trustee to recover damages for alleged violations of the automatic stay for dealing with the subject of such claims does not warrant review.

The trustee did not appeal the bankruptcy court's denial of his claim for punitive damages. App. 12. The Eighth Circuit correctly held that the trustee could not recover damages (of any kind) for an alleged violation of the automatic stay, where the trustee's alleged property interest was a "claim for avoidance" of the pre-petition assignment of the trademark, and the trustee had never established the claims for avoidance and recovery under 11 U.S.C. §§547, 548 and 550.

The trustee has attempted to avoid the need of proving his claims for avoidance of the pre-petition assignment and for recovery under the statutes provided for such actions by substituting a claim for an alleged violation of the automatic stay for such statutory actions. The Eighth

Circuit correctly determined that, as a first step, the trustee must establish his claims for avoidance and right of recovery under 11 U.S.C. §§547, 548 and 550 before he can claim damages for an alleged violation of the automatic stay with respect to the property that is the subject of such claims.

The trustee, however, dismissed all claims for avoidance and recovery, for strategic purposes, and the time for re-filing such claims has long passed. Any attempt of the trustee to re-plead claims for avoidance and recovery under 11 U.S.C. §§547, 548 and 550 is barred by the statute of limitations, and has been for many years. 11 U.S.C. §546(a) (1991). The subsequent amendment of §546(a) applies only to bankruptcy cases filed after October 22, 1994. The Chapter 7 case in question was filed on October 15, 1991.

Under the specific facts of this case, the questions presented for review in this petition will never be reached. Supreme Court review is certainly not warranted at this juncture.

CONCLUSION

For the reasons set forth above, the trustee's petition for a writ of certiorari should be denied. However, respondents respectfully submit that their petition for a writ of certiorari, No. 97-7, should be granted for the reasons stated therein.

Respectfully submitted,

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Dated September 29, 1997